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91-696

NO. _____

Supreme Court, U.S.
FILED
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JAMES WILSON,

Petitioner

versus

SECURITY INSURANCE CO.,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF CONNECTICUT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

Does a court reviewing arbitration proceedings have a constitutional duty under the 5th and 14th Amendments of the United States Constitution to require proof of the whole record presented in the arbitration proceedings before: a) finding that factual error occurred; b) entering final judgment, in lieu of a vacatur.

Parties to the proceeding:

Petitioner: James Wilson of Fairground Road, Woodbridge, Connecticut.

Respondent: Security Insurance Company, Hartford, Connecticut.

LIST OF CITATIONS

United States Citations

Burlington Truck Lines Inc. v. United States, 71 U.S. 156, 168-169, 9 L Ed 2d 207, 215, 83 S Ct 239 (1962) 26

Citizens To Preserve Overton Park v. Volpe, 401 U.S. 402,419-420, 91 S Ct 814, 28 L Ed 136, 155 26

New Orleans v Dukes, 427 U.S. 297, 96 S Ct 2513, 49 L Ed. 2d 511 . .27

Federal Citations

Arkansas Power & Light, 725 F.2d 716 (D.C. Cir. 1984) 25

Bell Aerospace Co. v. Local 516, 500 F.2d 921, 923 (2d Cir. 1974) 24

Fine v. Bear, Stearns & Co., 765 F.Supp 824,(S.D.N.Y. 1991) 25

Hoteles Condado Beach, LaConcha & Convention Center v.Union De Tronquistas Local 901, 763 F.2d 34 (1st Cir. 1985) 24

Konkar Maritime Enterprises. S.A. v.Compagnie Belge D'Affretement, 668 F.Supp. 267 (S.D.N.Y.) 24

Occidental Petroleum Corporation v. S.E.C., 873 F.2d 325, 338 . . .25

Sears v. Federal Savings & Loan,
775 F.2d 1038 (9th Cir. 1985) . .25

Teamsters Chauffers, Etc.v. E.D.
Clapp Corp. 551 F.Supp 570,
578,(N.D.N.Y.) Aff'd 742 F.2d
1441 (2d Cir. 1983) 25

Connecticut Cases

Aetna Life & Casualty Co. v.
Bulaong, 218 Conn. 51, 64,
A.2d (1991) 22

Blue Sky Bar, Inc. v Stratford,
203 Conn 14, 27, 523 A.2d 467 . .27

Chmielewski v. Aetna Casualty &
Surety Co., 218 Conn. 646,
A.2d ___. (1991) . . . 18,22,23,24

Nationwide v. Gode, 187 Conn.
386, 446 A.2d 1059 19

Pecker v Aetna Casualty and
Surety Co., 171 Conn. 443, 370
A.2d 1006 18,19,20,21

Safeco v. Vetre, 174 Conn. 329,
387 A.2d 539 19,20,21

Secondino v. New Haven Gas Co.,

147 Conn. 672, 165 A.2d 598 . .26

Styles v Tyler, 64 Conn 432, 30
A 165 27

Wilson v. Security, 199 Conn.
618, 509 A.2d 467 11

Statutes, Regulations

C.G.S. 38-175c 11

Regulation 38-175a-6 18

28 USC §1257(a) 8

Reference to Orders and Opinions below:

A. Orders for judgment for respondent entered July 9, 1991, granting motion of Respondent dated 06/10/91, and denying cross-motion of petitioner for vacatur of arbitration award. Appendix p. 1-11.

B. Decision of Supreme Court of Connecticut, 213 Conn. 532, 569 A.2d 40 dated 1/30/90. Appendix p. 12.

C. Decision upon motion for reargument, Order without opinion dated 2/21/90. Appendix p. 51

D. Opinion of Arbitration Panel, dated 07/25/88: Appendix p. 36,

E. Dissenting opinion of Arbitrator dated 07/22/88: Appendix p. 40

F. Memorandum of Superior Court sustaining award for Petitioner, dated 12/09/88: Appendix p. 20.

Order Denying Prior Petition for Certiorari to The United States Supreme Court

Cert. Denied: 89-1808, October 1, 1990, 111 S Ct 52.

(Entered prior to denial of Motion for Vacatur of Arbitration Award and Order of Judgment for Respondent.)

Jurisdictional Statement.

Grounds: The Due Process clause of the United States Constitution requires that judicial review be made upon the entire record. Petitioner's rights to due process of law in arbitration proceeding are violated by a review process resulting in a final judgment for the respondent without vacating the arbitration award after proceedings in which the respondent-plaintiff elected not to offer proof of the record in arbitration and successfully objected to proof of such record offered by petitioner. Petitioner's constitu-

tional objections duly made and preserved.

i. Date of Judgment or decree sought to be reviewed: Order of Connecticut Supreme Court directing the entry of final judgment for respondent: July 9, 1991. Prior decision of Connecticut Supreme Court: January 30, 1990.

ii. Statutory provision believed to confer jurisdiction in this court to review the judgment or decree by Writ of Certiorari: 28 USC §1257(a).

G. Constitutional Provisions.

Amendments to Constitution of the United States.

ARTICLE V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation."

ARTICLE XIV

"Section 1. All persons born or natu-

ralized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

H. Concise Statement of Case

Wilson, a police officer, sustained serious personal injury while on duty when struck by an uninsured motor vehicle. The respondent Security Insurance Co. had issued an Automobile Insurance policy to the "Town of Woodbridge, et al" with uninsured and underinsured motorist coverage as mandated by C.G.S. 38-175c. Unable to agree as to the amount payable, Wilson made demand for arbitration under the provisions in the policy. Respondent's refusal to arbitrate led to the first appeal to the Supreme Court which decided that respondent was required to submit to arbitration, that coverage issues must be presented to arbitration by statute. Additionally the court announced that the insurance company was entitled to "review de novo" after the decision on coverage by the arbitration panel. Wilson v. Security, 199 Conn. 618, 509 A.2d 467.

The parties proceeded to arbitration. After hearing the majority made a finding and award on July 25, 1988, for Wilson. Appendix p.36. One arbitrator dissented, on grounds that did not include the stacking issue determined on appeal. Appendix p. 40

Respondent Security Insurance Co. filed an application to vacate the award on August 18, 1988 alleging the arbitrators violated state law without setting forth in the application its grounds, praying remand to arbitration for an order "in conformity with the opinion of dissenting arbitrator. Appendix p 48. The application attached the policy and the Award and the Dissenting Opinion. No transcript or other record of the evidentiary proceedings in arbitration were filed. Amendment to that Petition was filed September 12, 1988 alleging error in permitting the stacking of coverage.

At the hearing on the application to vacate the award on September 19, 1989 before the Superior Court, Security Insurance Co. proceeded claiming that the only evidence needed was the policy and decisions of the arbitrators, that evidence heard by the arbitrators was irrelevant and not offered. Appendix p. 72-74, 78. Wilson claimed that the evidential record before the arbitrators was necessary. Appendix 75-76, 78. Wilson claimed that his right to have the court hear the nature of the evidence presented to the arbitrators was protected by the Fifth and Fourteenth Amendments to the United States Constitution, Appendix p.83, and that this right prevented the Security from succeeding without any evidential record. Appendix 83. The trial court ruled that the burden of presenting the evidential record was upon respondent,

Security Insurance Co. Appendix 74-75, 78 Wilson made offer to present evidence as to the content of the hearing before the arbitrators. Appendix 80, 83.

The Superior Court on December 8, 1988 found for Wilson on the Motion to Vacate. Appendix p.20, In its memorandum, the Trial Court found:

> "The Security Insurance Co. offered no record to this Court that the finding of the arbitrators was not supported by the evidence.
> The Security Insurance Company by its objection to the offer of proof by Wilson confined the proceedings before this court on the record yet offered no proof by the record before the arbitrators to reject their findings."

and entered judgment for Wilson. Appendix p.33.

The Security Insurance Company appealed to the Supreme Court of Connecticut, assigning error that the decision of the trial court erred in upholding the award insofar as it permitted stacking of coverages.

Wilson preserved the federal claim by his Preliminary Counter-Statement of Issues on Appeal, also claiming Security had abandoned or waived the right to review by not presenting to the record evidence of the matters heard by the arbitrators and that such failure would violate petitioner's due process rights under the United States Constitution if respondent's claims were allowed. Appendix p.83-84.

Wilson's Brief to the Supreme Court of Connecticut, stated that the provisions of the due process clauses of the Fifth and Fourteenth Amendments to the Constitution were relied upon and had been relied upon in the trial court. Wilson's Brief, Appendix 53-61, 61-65; in particular at 53, 64. The failure of Security to present the record before the arbitrators and its objection to Wilson supplying

evidence of the proceedings before the arbitrators was claimed to be a denial of due process of law under the United States Constitution. Wilson's Brief, Appendix p. 51-53, 61-65.

On January 30, 1990 the Supreme Court reversed the trial court based upon a presumptive finding as to factual expectations of the parties to the contract of insurance and hypothetically multiplying coverage risks in manner not found by arbitrators.

The Supreme Court of Connecticut did not in its decision refer to federal questions resulting from failure to produce in the trial court evidence of the record before the arbitrators, nor to constitutional claims made by Wilson as to due process of law.

On February 8, 1990, petitioner Wilson filed a Motion for reargument and in-

cluded as the primary grounds stated as follows: "Did the decision violate James Wilson's rights under the Contract Clause and to due process of law guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, and Article I, Sec. 10 of the Constitution of Connecticut by ....B) by failure to conduct review de novo based upon the full record of proceedings in arbitration over objection, ..." .

Motion to Rearque denied February 21, 1990 without opinion.

Petitioner had argued that the rights of the parties under the contract had to be determined by evidence and by the terms of the contract, which were legally permissible under the regulations and statutes of the State of Connecticut.

In 1972, the Connecticut Supreme Court had held that the Minimum Regulations of

the State of Connecticut governing uninsured motorist coverage, Regulation 38-175a-6 did not authorize or permit the inclusion in insurance policies of "other insurance" provisions to limit or exclude coverage. Pecker v Aetna Casualty and Surety Co., 171 Conn. 443, 370 A.2d 1006. The attempt to include a provision not authorized by regulation was void. Reaffirmed: Chmielewski v. Aetna Casualty & Surety Co., 218 Conn. 646, at page 674, ___ A.2d ___. (1991) The insurance policy involved in Pecker was construed without reference to a void proviso. In 1975 the Connecticut Supreme Court held that a single policy issued to cover more than one vehicle with separate listings of vehicles, separate premium charges for each vehicle and separate coverages for each vehicle required separate stackable coverages for persons insured in respect

to each vehicle so insured. Safeco v. Vetre, 174 Conn. 329, 387 A.2d 539. In the year 1986 in Nationwide v. Gode, 187 Conn. 386, 446 A.2d 1059, the Supreme Court of Connecticut followed the decisions of Pecker and Safeco after legislative amendments of 1979. In Nationwide, the court indicated that it would look to the intention of the parties to the contract and reviewed the contract language to determine the intent of the parties. In Nationwide the dissenting opinion noted that arguments directed toward the intent of the parties would require review of the actuarial expectations based upon proof of premium receipts and the profit and loss ratios. In a footnote to Nationwide decision the Supreme Court reserved decision as to the effect upon policies issued for fleet coverage.

The policy issued by Security Insurance

Co. issued to "The Town of Woodbridge, et al" contained a form of uninsured motorist coverage in the policy which was identical to the form used for the family automobile policy, defining the term "who is insured" as "1. You or any family member". The uninsured motorist coverage defined the term family member and contained other provisions that tracked the types of policies used for coverage in Pecker and Safeco.

The Connecticut legislature vested the fact-finding powers with the arbitrators. They had the original jurisdiction to take evidence as to the intentions of the parties. Such evidence might have included negotiations between the parties, the actuarial expectations of the insurance company based upon calculations actually used to set premiums, and advice to underwriting departments from legal advi-

sors along with knowledge of statutory-regulatory requirements. The process of proceeding to final judgment for respondent without review of a whole record is prejudicial to petitioner. The process presumes the record did not support the arbitrators decision was correct upon the issues presented to them. Due process should not allow the taking of judicial notice of a rebuttable fact during appellate review. Review of isolated charges for insurance premiums does not establish industry practice nor set the limits of expectations. Respondent insurance company selected a form for uninsured motorist coverage identical to that used for a family automobile policy. It should have structured its premiums according to the expectations derived from Pecker and Safeco or changed its policy. The petitioner is prejudiced by a record that

does not even show industry practices. Reasonable expectations are that premium charges are intended to induce business by beating the competition. With evidence at trial restricted, the Petitioner is prejudiced by inability to show that more than one policy was disclosed to the Arbitrators, and that the credit of $74,000.00 now taken to reduce coverage to zero dollars was apportionable and not solely for the respondent, and when apportioned, does not reduce coverage to zero. The petitioner is aggrieved when the court did not vacate the order of the arbitrators instead of entering judgment for the respondent, contrary to precedent. See: Aetna Life & Casualty Co. v. Bulaong, 218 Conn. 51, 64, _____ A.2d _____ (1991), fn 11. Chmielewski v. Aetna Casualty & Surety Co., 218 Conn. 646, at page 680, ___ A.2d ___: holding vacatur is the

remedy when proof of facts is required. None of the arbitrators found for the insurance company on the stacking issue based upon the record before them.

Under Connecticut law determination of whether the coverage was that that of a family policy or a business policy was a factual issue on which a party has opportunity to present evidence to arbitrators for decision. Chmielewski v. Aetna Casualty & Surety Co., 218 Conn. 646, at page 667, ___ A.2d ___. Under Connecticut law a review of arbitration proceeding must be based upon a transcript of the record. Chmielewski v. Aetna Casualty & Surety Co., 218 Conn. 646, supra at pg. 661, 663, 666, ___ A.2d ___. The arbitrator's decision is presumptively correct and subject to rebuttal only by "clear preponderance of the evidence". Chmielewski v. Aetna Casualty & Surety

Co., 218 Conn. 646, at page 665, ___ A.2d ___. The decision of arbitrators cannot be substituted for by an initial judicial determination of coverage. Chmielewski v. Aetna Casualty & Surety Co., 218 Conn. 646, at page 680, ___ A.2d ___.

Federal Courts have recognized, implicitly or explicitly, that the standard of review in respect to arbitration or administrative hearings requires examination of the entire record. The arbitrators decision must be based upon full and fair consideration of the entire evidence. Hoteles Condado Beach, LaConcha & Convention Center v. Union De Tronquistas Local 901, 763 F.2d 34, (1st Cir. 1985). Vacatur is appropriate when exclusion of relevant evidence deprives a party to a fair hearing. Bell Aerospace Co. v. Local 516, 500 F.2d 921, 923, (2d Cir. 1974); Konkar Maritime Enterprises, S.A.

v. Compagnie Belge D'Affretement, 668 F.Supp. 267, (S.D.N.Y.); Teamsters Chauffers, Etc. v. E.D. Clapp Corp. 551 F.Supp 570, 578, (N.D.N.Y.) Aff'd 742 F.2d 1441, (2d Cir. 1983); Fine v. Bear, Stearns & Co., 765 F.Supp 824, (S.D.N.Y. 1991). To allow meaningful judicial review, the record of proceedings must be produced. Occidental Petroleum Corporation v. S.E.C., 873 F.2d 325, 338; Sears v. Federal Savings & Loan, 775 F.2d 1038, (9th Cir. 1985). Facts found by administrative body must have some basis in the record. Arkansas Power & Light, 725 F.2d 716, (D.C. Cir. 1984). Generally, judicial review of administrative action is limited to review of the record on which the administrative board decision was based.

The United States Supreme Court has found that in review of administrative

hearings, the "whole record" is necessary for plenary review. Citizens To Preserve Overton Park v. Volpe, 401 U.S. 402, 419-420, 91 S Ct 814, 28 L Ed 136, 155, citing: Burlington Truck Lines Inc. v. United States, 71 U.S. 156, 168-169, 9 L Ed 2d 207, 215, 83 S Ct 239 (1962).

Wilson urges the granting of certification for the purpose of preserving rights established after and upon full evidential hearing. The "reasonable expectations of the parties" cannot be reached after examination of one document selected solely by the Insurance Company. Consequently the Court acted without knowledge as to whether the insurance company waived rights in arbitration. Secondino v. New Haven Gas Co., 147 Conn. 672, 165 A.2d 598. Failure to produce evidence permits an inference evidence not produced is unfavorable.

The Connecticut Supreme Court has no fact-finding authority. Styles v Tyler, 64 Conn 432, 30 A 165, and does not sit as a super legislature. Blue Sky Bar, Inc. v Stratford, 203 Conn 14, 27, 523 A.2d 467; New Orleans v Dukes, 427 U.S. 297, 96 S Ct 2513, 49 L Ed. 2d 511.

Respectfully submitted

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Admitted June 13, 1986

Certificate of Service

I, Peter B. Reilly, do hereby certify that the foregoing Petition for Certiorari together with the Appendix thereto was duly deposited in the United States Mail, postage prepaid, on the day of October, 1991, addressed to:

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